Supreme Court of the United States

October Term, 1911.

No.

THE MITCHELL STORE BUILDING COMPANY, *Petitioner*,

vs.

R. DEV. CARROLL, Trustee in Bankruptcy of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt, *Respondent.*

Brief for Respondent in Opposition to the Petition for a Writ of Certiorari.

Petitioner seeks to have this court review by certiorari a decree of the United States Circuit Court of Appeals for the Sixth Circuit which affirmed an order of the District Court granting a temporary injunction against petitioner, a party to a bankruptcy proceeding in the District Court. The order restrained petitioner, pending the settlement of the bankrupt's estate, from prosecuting a suit in a state court brought for the purpose of obtaining a lien on a part of the bankrupt's estate, which was in the custody of the District Court by virtue of the bankruptcy proceeding. See opinion of the Circuit Court of Appeals reported in 193 Fed. 616. The petitioner now has an appeal pending in this court to review said decree of the Circuit Court of Appeals.

We respectfully submit that the petition should be denied.

LAWRENCE MAXWELL,

Counsel for Respondent.

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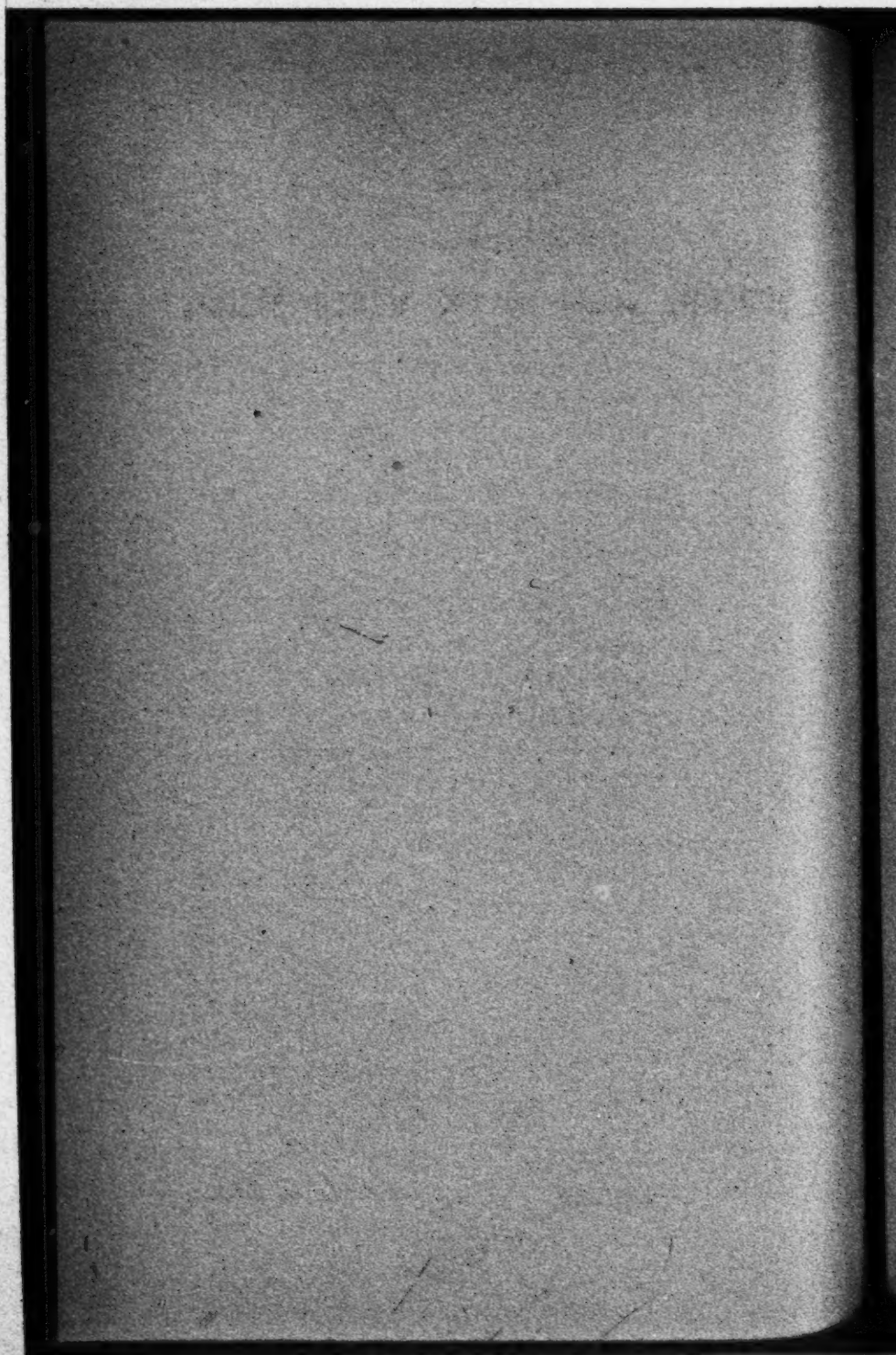

No. 212.

OCTOBER TERM, 1913.

Supreme Court of the United States,

THE MITCHELL STORE BUILDING COMPANY, *Appellant*,

vs.

R. deV. CARROLL, Trustee in Bankruptcy of the Herman Keck Manufacturing Company, Bankrupt, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On February 8, 1909, certain creditors of The Herman Keck Manufacturing Company, a corporation organized under the laws of Ohio and engaged in the manufacture of jewelry at Cincinnati, Ohio, filed a petition in bankruptcy against it in the United States District Court there, praying also for a receiver of its property and assets. At the same time, said petitioning creditors filed an application in said District Court for the appointment of a receiver for the property and assets of The Duhme Jewelry Company, which was also a corporation organized under the laws of Ohio and engaged in the retail jewelry business in said city, alleging that said Duhme Company was a mere department and adjunct of said Keck Company; that all its capital stock was owned and held by said Keck Company; that its Board of Directors consisted of the same persons and officers as were directors and officers of said Keck Company; that all of the funds for the organization

and transaction of its business were furnished by said Keck Company, and that said companies were in fact one and the same concern; that both companies occupied the same premises in Cincinnati; that their books of account and finances were in charge of the same bookkeeper and office management, and that there were creditors of the Duhme Company "who may have a first equity in the assets of said Company for the payment of their respective claims, but that the value of the assets of said Company is largely in excess of the claims of the creditors of said Duhme Company, and that the surplus after said claims are paid belongs to and is the property of The Herman Keck Manufacturing Company." Said application also alleged "that for each and all of the foregoing reasons it is absolutely necessary and essential for the protection of the creditors of The Herman Keck Manufacturing Company and the preservation of the estate of The Herman Keck Manufacturing Company in bankruptcy, that a receiver be appointed to take charge of the assets and the property of The Duhme Jewelry Company." (Rec., pp. 10-13 and 33). On the same day, to-wit, February 8, 1909, Robert deV. Carroll was appointed receiver of both companies. The Keck Company admitted that the property and assets of The Duhme Company belonged to it, and alleged that it was solvent, etc. (Rec., 22-24). It was subsequently, to-wit: on December 3, 1909, after a protracted hearing before the Referee and District Judge Thompson, adjudged a bankrupt, and Carroll was elected and qualified as its Trustee. (Rec., 24).

On March 28, 1910, Carroll, as said Trustee in Bankruptcy, filed a petition in the District Court, alleging in substance that the Duhme Jewelry Company was a mere department and adjunct of the Keck Company, that they were in fact one

and the same concern; that the Keck Company was the owner of all the assets of the Duhme Company, etc., and praying "that Robert deV. Carroll, Receiver of The Duhme Jewelry Company, may be authorized and directed to turn over to him all of the assets in his possession as such receiver, and as certain creditors have appeared herein claiming to have dealt with The Duhme Jewelry Company as a separate corporation and asserted that their claims against said corporation are entitled to be first paid out of the assets of The Duhme Jewelry Company before creditors of The Herman Keck Manufacturing Company are entitled to any part of said assets, that said Trustee be further ordered to preserve said assets of said The Duhme Jewelry Company by proper accounting and record as a separate property until the further order of this court." (Rec. p. 34). This petition was strenuously resisted by persons claiming to be stockholders of the Duhme Company, and on June 2, 1910, the District Court (Judge Sater), after a full hearing, found "the issues joined in favor of said Robert deV. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, and that all of the property and assets of The Duhme Jewelry Company, now or heretofore in his hands as Receiver was the property of the bankrupt herein, The Herman Keck Manufacturing Company, and is now the property of and belongs to said Robert deV. Carroll as Trustee in Bankruptcy of its property and assets," and ordered and adjudged "that said Robert deV. Carroll, as said Receiver of the property and estate of The Duhme Jewelry Company, forthwith turn over to himself as Trustee in Bankruptcy of the bankrupt herein, all of the property and assets, including cash, now in his hands as such Receiver, and that he keep an account thereof separate and

distinct from his account of the balance of the property of said bankrupt." Judge Sater's opinion is found at Rec. 26-30 and the decree at Rec. 30-31. No appeal was taken from this decree, and all of the property and money in the hands of the Receiver of the Duhme Company was accordingly turned over to the Trustee in bankruptcy of the Keck Company and the Receiver discharged.

All of the claims against the Duhme Company which have been proved and allowed in the bankruptcy court have been paid by said Trustee in Bankruptcy, and there is a balance of cash in his hands derived from the sale of the property and assets of *that* Company sufficient to pay the claim of the appellant, if on final hearing it shall be adjudged to be a valid claim against that company (Rec. 34).

Appellant's claim is for $6,500.00 damages alleged to have been sustained by it because of the breach of certain covenants of a lease between it and the Duhme Company, dated August 30, 1900, for the occupancy of certain premises in Cincinnati known as Nos. 19 to 25 West Fourth Street, and part of which it sublet to the Keck Company. The Duhme Company occupied said premises and paid the rent fixed by the lease until February 8, 1909, when, as heretofore stated, Carroll was appointed Receiver of its property and assets. He occupied said premises and paid said rent from that time until June 30, 1910, on which day the Trustee in Bankruptcy vacated them and elected not to take said lease, under the order of the bankruptcy court entered on June 9, 1910 (Rec. 35). The damages claimed by appellant represent the difference between the rent for said premises as fixed by said lease for the period from June 30, 1910, until December 31, 1910, the end of the term granted by said lease, and the rent

it was able to obtain for them for said period from the McAlpin Company, to whom it subsequently leased them, and the amount of certain waste alleged to have been committed by said Duhme Company (Rec. 35 and 40).

The following steps have been taken by appellant to enforce its said claim, viz:

1. On October 8, 1910, it brought an action in the Common Pleas Court of Hamilton County, Ohio, against the Duhme Company for said sum of $6,500.00, and caused summons to be issued and served on said company. A copy of the petition is found at Rec. 39.

2. On the same day it filed an application in the District Court for an order directing the Trustee in bankruptcy to withhold from distribution $6,500.00 of the Duhme Company's assets, "until final judgment is rendered in said suit" (Rec. 38). This application was granted on October 24, 1910 (Rec. 47-48), and on November 3, 1910, said Trustee in bankruptcy moved to have said order set aside (Rec. 48).

3. On November 14, 1910, the appellant moved to strike said motion of the Trustee from the files (Rec. 49). On November 19, 1910, said motion of the Trustee was sustained, said motion of the appellant overruled and its application to withhold from distribution said sum of $6,500.00 also overruled (Rec. 36-37). It subsequently filed in the District Court its petition to review said order of November 19th (Rec. 49-52). This petition to review is still under submission to the District Court.

On November 23, 1910, said Trustee filed a petition with the Referee in Bankruptcy, alleging that appellant's said claim and suit "constitute a cloud upon the title and possession of your petitioner to said assets of said Duhme Jewelry

Company now in his hands as Trustee of the Bankrupt herein, and a hindrance to their speedy and proper distribution by him to creditors of said bankrupt, and that it is necessary for the complete determination of said claim and for a speedy and proper distribution of said assets to creditors of said bankkrupt, that said The Mitchell Store Building Company be forthwith made a party to this proceeding.

Wherefore your petitioner prays that said The Mitchell Store Building Company be forthwith made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against said Duhme Jewelry Company or its said assets now in his hands as aforesaid; that notice of the pendency and prayer of this petition, in such form as the court may deem proper, be given to or served upon said Mitchell Store Building Company, and for such other or further relief as he may be entitled to in the premises," and on the same day an order was entered by the Referee as prayed (Rec. 5-7). A subpœna was also issued on this petition for the appellant and served on it (Rec. 7-8).

On December 9, 1910, said Trustee filed a motion in the District Court (Rec. 9-10) for an order restraining the appellant from proceeding with or continuing the prosecution of said suit by it in the Common Pleas Court, and also his affidavit in support thereof, in which he alleged that it "has applied to the Court of Common Pleas of Hamilton County, Ohio, for a judgment by default or otherwise against The Duhme Jewelry Company in the suit which is now pending in said court against said Duhme Jewelry Company, the nature of said suit being fully set forth in his petition filed herein on November 23, 1910, and that said company threatens to and will unless enjoined by this Honorable Court,

proceed with the prosecution of said suit and obtain such a judgment therein against said Duhme Jewelry Company.

"Affiant believes that the purpose of said Mitchell Store Building Co. in obtaining such a judgment is to file same with the Referee in Bankrkuptcy herein as a preferred claim or lien upon the assets of said Duhme Jewelry Company now in his hands as Trustee in Bankruptcy of The Herman Keck Manufacturing Company." After a full hearing by the District Court (Judge Sater), appellant not denying the allegations of said affidavit, the injunction prayed for was allowed. His opinion on the application for said order is found at Rec. 52, and the order of injunction, which was entered on February 15, 1911, at Rec. 56-57.

On February 24, 1911, the appellant filed in the United States Circuit Court of Appeals for the Sixth Circuit a petition for review and an appeal (Rec. 1) from said order of injunction. After a full hearing that court affirmed the order appealed from (Rec. 65-70), and 193 Fed. 616. It is to review the correctness of that affirmance that appellant has taken this appeal (Rec. 70).

ARGUMENT.

I.

No proceeding was taken by any of the parties to the decree of the District Court, entered on June 2, 1910, adjudging the assets of The Duhme Company to belong to the trustee in bankruptcy of the Keck Company, or by the Appellant, to review said decree, and it is therefore final and conclusive of that question.

Appellant's counsel argue (Brief, p. 3) that it was not a party to the bankruptcy proceedings of the Keck Company, or to the proceedings by which the Duhme Company's assets

were turned over to the Trustee in Bankruptcy of the Keck Company, and could not have been for the reason that it had no claim against the Duhme Company at that time, the covenants of the lease not being broken until June 30, 1910. This being true, it necessarily follows that said decree was correct and proper when entered, so far as appellant was concerned. If, because of subsequent changes in conditions, it became injurious as to it, the plain duty of the appellant was to have itself made a party to the proceedings in the District Court and there set up the facts. The right to appeal from the decree of June 2nd was not lost to parties until December 2nd, 1910 (26 Stat. at Large, 827, Sec. 11), long after appellant knew the exact amount of its alleged claim against the Duhme Company. Not having intervened in the District Court, but having permitted that court's decree to become operative and the assets of the Duhme Company to be turned over to the Trustee in Bankruptcy of the Keck Company and by him administered as assets of that company (see the certificate of the Referee at Rec. 32), it is now too late for it to question the correctness of that decree, and the Circuit Court of Appeals has so decided (Rec. 66-67). Appellant's counsel attempt to question this decision and dispute indirectly the decree of June 2, 1910, by arguing (Brief, 14) that the Circuit Court of Appeals necessarily assumes the legal correctness of that decree. But that court only assumes the true state of facts, namely: that the assets of the Duhme Jewelry Company were in the possession of the Trustee, and that the validity of that possession is now questioned by no one. A fund in the possession of a trustee in bankruptcy as trustee must be considered a part of the bankrupt estate until it is separated therefrom by legal proceedings. In Hebert vs.

Crawford, Trustee, 228 U. S. 204, it was held that such proceedings under certain circumstances could be instituted in the state courts. But such is not the nature of the suit now enjoined, and the appellant not only has failed to begin such proceedings in a state or federal court, but has "recognized the matter as closed when it voluntarily came into the District Court to ask that it might have sufficient of the assets so acquired by the court of bankruptcy impounded to meet its anticipated judgment." (Opinion of Circuit Court of Appeals, Rec. 67; see to the same effect In re Trayna, 195 Fed. 486.)

II.

Appellant's objections to the decree of June 2nd are without merit.

If we bear with the counsel for the appellant and concede for the sake of argument, that it is entitled on this appeal to question the correctness of the decree of June 2nd, 1910, what is the result? It is not necessary to maintain that the ownership of capital stock in a corporation always carries with it the ownership of the tangible assets of that corporation. Whether such a proposition is correct or not, as a matter of law, is not material, because it did not constitute the sole basis for the opinion and decree of the learned District Judge. This is obvious from the opinion itself (found at Rec. 26) and from the following quotation from the later opinion of the District Court on the motion for injunction, viz:

> "At or about the time the petition in bankruptcy was filed against The Herman Keck Manufacturing Company, hereinafter called the Keck Company, and a Receiver was appointed therefor, an application was also made for the appointment of a Receiver for The

Duhme Jewelry Company, hereinafter called the Duhme Company, on the ground inter alia, that the funds furnished to the organization for the transaction of its business were furnished by the Keck Company, that it was a subsidiary company and a mere department, adjunct, selling agency and instrumentality of the Keck Company; that its stock was all owned by the latter company and that the two companies were in fact one, and their assets were greatly commingled. The person appointed Receiver of the Keck Company was also designated as the Receiver of the Duhme Company. Thereafter the Keck Company was adjudicated a bankrupt and a trustee in bankruptcy was elected.

"In May, 1910, after a full hearing in a controversy between stockholders and creditors, on the facts submitted and the law as found in Re Munsey Pulp Co., 139 Fed. Rep. 546, Re Reiger, Kapner & Altmark, 157 Fed. Rep. 609, and Re Watertown Pump Co., 169 Fed. Rep. 252, an opinion was handed down in this court, holding that the Duhme Company was a mere adjunct and asset of the Keck Company. It was affirmatively found that the reorganization and readjustment which took place as between the two companies in 1907 was had because the Duhme Company was a mere department of the Keck Company, and because if the Duhme Company should be shown as an asset of the Keck Company, which felt the need of a larger capital, the latter company would have a better credit margin for carrying on its business" (Rec. 52-53).

The court did not decide that because all of the capital stock of the Duhme Company stood in the name of the Keck Company it thereby owned all of the property and assets of that company, but regarded that fact, and properly so, as bearing upon the question of the real ownership of its assets, viz:

"The proceedings had on June 1, 1907, by the stockholders and directors of the two companies resulted merely in a transfer into the name of the Keck Company of that which it already owned." Opinion of May 26, 1910, Rec. 29.

Appellant's counsel at p. 20 of their brief, say that "the decree of June 2nd was therefore sustained by the authority cited so far as the contest between pretending stockholders and the trustee was concerned, but it is not sustained by any authority in so far as it affects the rights of bona fide objecting creditors of the Duhme Company," and on page 21 contend that said decree is contrary to the familiar principle that a court of equity, on the dissolution of a corporation, will apply the corporate assets to the payment of its debts, before any distribution is made to its stockholders. But counsel lose sight of the fact that the District Court in turning the assets of the Duhme Company over to the Trustee in bankruptcy of the Keck Company, expressly said that "If no complication exists or arises, he should at an early date, if practicable, apply the funds, and the proceeds of the property yet to be sold, *to the satisfaction of debts due those who dealt in good faith with that company.*" Rec. 30, and again in its opinion on the application for injunction "the proceeds arising from the sale of such assets were ordered to be held separate from those of the Keck Company and *applied first to the satisfaction of debts due those who dealt in good faith with the Duhme Company, the surplus, if any, to be applied to the payment of the debts of the Keck Company.*" Rec. 53. This direction of the court has been carefully carried out, and as the agreed statement of facts shows (Rec. 34), all creditors of the Duhme Company who had sufficient confidence in the bona fides of their claims to prove them with the Referee as

claims against that company, have long since been paid in full. The corporate entity of the Duhme Company has not been lost sight of for a moment by the bankkruptcy court in its administration of the estate, but on the contrary has been scrupulously preserved for the benefit of every person entitled to it.

The objections of appellant to the decree of June 2nd which we have been considering, are purely technical. It is to be noted that it does not deny that all of the funds for the organization of the Duhme Company were furnished by the Keek Company; that the one was merely the selling agency of the other; that the two were "only distinguished in name for the sake of retail and wholesale distinction," etc. (Rec. 26). These are facts, the existence and truth of which have been found by the District Court after a full hearing on evidence, and on which it based its decree. Appellant does not and can not controvert them; they are not before this court for review, and the decree, based as it is upon them, will be accepted as final and conclusive.

It is worthy of mention that prior to Judge Sater's decision of May 26, 1910, and after a hearing lasting many months, the same conclusion had been reached by the Referee and by District Judge Thompson in adjudicating the Keek Company a bankrupt (Rec. 24 and 32); that no creditor of the Duhme Company contested the transfer of these assets to the Trustee in bankruptcy; even the alleged stockholders of that company realizing the futility, on the evidence adduced in the District Court, of contesting the correctness of that transfer, accordingly prosecuted no appeal from that court.

III.

The claim of appellant is nominally against the Duhme Company, but, reduced to its last analysis, is against the bankrupt estate, and the District Court having at all times prior to the existence of its claim, and to the institution of its suit in the state court, had possession and control of the property composing the bankrupt's estate, has jurisdiction "to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein" (Mr. Justice Day in Whitney vs. Wenman, 195 U. S. 589, at page 552).

As said by the lower court, Rec. 54-55:

> "Nevertheless, the Duhme Company was the Keck Company under another name. Its assets were the property of the Keck Company, and after its bona fide debts were paid, the creditors of the Keck Company are entitled to the surplus proceeds for the satisfaction of their claims. The title to the property of the Duhme Company to the outside world was in that company, but was in fact in the Keck Company and, subject to the rights of the Duhme Company's bona fide creditors, was under the control of the Keck Company. The title to the Duhme Company's property passed to the trustee in bankruptcy as of the date of the adjudication. The money which the Mitchell Company seeks to recover is a part of the bankrupt's assets, in the possession of the bankruptcy court, subject to its control and its order of distribution. The Mitchell Company recognized this fact when it filed a motion in the referee's court for an order directing that so much of the funds in its hands be set aside as may be necessary to pay the judgment, if any, which it may obtain in the state court, and also when it moved to strike the Trustee's motion from the files and resisted the vacation of the referee's order. Its claim is nominally against the

Duhme Company, but, reduced to its last analysis, is against the bankrupt's estate. The trustee holds the property for whoever may be found rightly entitled to it, and persons claiming the right to share in it may be called upon to come into the bankruptcy court to assert their claims. The creditors are interested in determining the validity of every claim presented against the fund. The property, being in possession of the bankruptcy court, is withdrawn from the jurisdiction of all other courts, and that court has ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of such property."

To the same effect as Whitney vs. Wenman, supra, are:

White vs. Schloerb, 178 U. S. 542.

Bryan vs. Bernheimer, 181 U. S. 188.

Murphy vs. Hoffman Company, 211 U. S. 562, 570, where Mr. Justice Moody said, p. 570:

"The last two cases cited (referring to Whitney vs. Wenman and White vs. Schloerb, supra) proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession can not be disturbed by the process of another court. And see Skilton vs. Codington, 185 N. Y. 80, 85, 86 and Frank vs. Vollkommer, 205 U. S. 521, which by implication approve the same principle."

Hebert vs. Crawford, Trustee, 228 U. S. 204, 208, where Mr. Justice Lamar said: "Under these decisions (Whitney vs. Wenman; Murphy vs. Hoffman Co. supra) the physical possession of the crop brought the property within the exclusive jurisdiction of the bankrupt court. The finding in the

Summary Proceeding that LeBlanc had received possession, as trustee, was conclusive against him and was not subject to collateral attack by third persons."

In re Antigo Screen Door Co., 123 Fed. 249, 251, 253.

Keegan vs. King, 96 Fed. 758

In re McCallum, 113 Fed. 393

In re McMahon, 147 Fed. 684, where Judge Lurton said, p. 685:

"But we are now dealing with the jurisdiction of the District Court which had possession through its Trustee of the property of the bankrupt against which the protesting petitioner asserts a mortgage lien. If the District Court having possession of the res did not have jurisdiction to hear and determine claims to or against the res, unless the claimant should consent, what court did? Could the petitioner go into the state court and there assert his lien and then obtain a decree for its enforcement and thus deprive the court of primary jurisdiction of the control and custody of the controverted property? The possession of the res draws to the court jurisdiction of all questions in respect to title or liens irrespective of citizenship. Krippendorf vs. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Toledo & Rd. Co. vs. Continental Trust Co., 95 Fed. 487, 36 C. C. A. 155."

In re Swofford Bros. Dry Goods Co., 180 Fed. 549.

LeMaster vs. Spencer, 208 Fed. 210, 216.

We have shown in Subdivision I of this brief that it can not now be disputed that this fund is in the trustee's possession as a part of the bankrupt estate. The cases here cited support unreservedly the statement in Loveland on Bankruptcy, 4th. ed., pp. 107-108, that:

"Where property is in the possession of the trustee or receiver as a part of the bankrupt's estate, a court of bankruptcy has jurisdiction to settle all controversies and claims relating to such property" (p. 107, and cases cited).

IV.

Appellant was a party to the bankruptcy proceedings in the District Court and subject to the direct control of that court.

It doubtless became a party by its application of October 8th, 1910 (Rec. 38-39), in which it asked the District Court for affirmative relief with respect to property in that court's hands for distribution and which did not attempt to reserve jurisdiction (see In re Mertens, 131 Fed. 507, at p. 512, and opinion of the District Court, Rec. p. 56), but to remove any possible doubt on that point the Trustee's petition of November 23rd, 1910, set forth the allegations necessary to bring in new parties under subdivision 6 of Section 2 of the Bankrupt Act, giving that court jurisdiction to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

Said petition also alleged that the suit brought by appellant in the Common Pleas Court constituted a cloud upon his title to and possession of the Duhme Company assets and that said suit and the claim made by appellant therein was a hindrance to the speedy and proper distribution by him of said assets to creditors of the bankrupt, and therefore within subdivisions 7 and 15 of said Section 2, viz:

"Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in re-

lation thereto, except as herein otherwise provided" (Sub. 7);

"Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act" (Sub. 15).

The order of the Referee of November 23rd making appellant a party, etc., was therefore within his jurisdiction and is valid and binding upon the appellant. Moreover, its validity has not yet been attacked or questioned by or through any pleading filed by appellant.

On this point the Circuit Court of Appeals said: (Rec. 69).

"Appellant seems not to question that it is a party to the bankruptcy proceeding, which relation was effected, if not by its voluntary appearance with its motion to impound, certainly by its subsequent appearance to resist the application for a temporary injunction after a subpoena on it had by order of the referee been served on it upon application of the trustee to make it a party."

V.

Appellant's suit in the state court interferes with the speedy and proper distribution of the bankrupt estate and the injunction was therefore properly granted.

The Trustee's application asked the District Court to enjoin a party to the general bankruptcy proceeding pending before it, and whom it had properly ordered to set up for adjudication therein whatever claim it might have against the bankrupt's estate, from violating that order by proceeding further in its suit in the state court, and thus interfering with the due and proper administration of the bankrupt's estate.

The claim of the Mitchell Company is in substance that by virtue of its alleged dealings with the Duhme Company as a separate corporation, etc., it is entitled to be paid out of its assets (which are sufficient to pay in full all of such claims as may be valid), before the Keck creditors share therein. The affidavit of the Trustee filed in support of his application (Rec. 9) alleges that "affiant believes that the purpose of said Mitchell Store Building Company in obtaining such a judgment is to file the same with the Referee in Bankruptcy herein as a preferred claim or lien upon the assets of said Duhme Jewelry Company now in his hands as Trustee in Bankruptcy of The Herman Keck Manufacturing Company." That is to say, it would be claimed that such a judgment, while it could not of course be a lien itself, would be a judicial determination, or as appellant's counsel put it on p. 9 of their brief, "a liquidation," of the amount of its claim and as such entitled to preference in payment out of the Duhme assets, etc. These allegations of the Trustee are not now and never have been denied by the appellant or its counsel.

The purpose of the Trustee in seeking the injunction was to avoid the necessity of the court and himself having to meet at sometime in the future this very *claim* of liquidation, or any similar one, by preventing the appellant from laying the foundation for it. That this will be the result, if appellant is not restrained from prosecuting its said suit, is further shown by the following quotation from page 9 of its counsel's brief, viz: "the Mitchell Company will be obliged to present the judgment to the Trustee for payment, at which time the Trustee, if he awaits the determination of the suit in the state court before making distribution, *may*

attempt an inquiry into the judgment, and if it appears that the state court was not the proper place to *liquidate* the claim, will have the claim *reliquidated and inquired into.*" Can it be said that such a course, by one who is a *party* to the bankruptcy proceedings, and who has been ordered to set up therein any claim which it might have, is not an interference with the speedy and proper administration of the bankrupt's estate, or that no benefit results to that estate by now putting an end to such a course? Does not such action by the court promote the policy and purpose of the bankrupt act, which every court that has ever considered the question has held to be "to secure an *equal* and *speedy distribution* of the bankrupt's estate among his creditors?" Under such circumstances can it be said that such an injunction is not "necessary for the enforcement of the provisions of this Act" (Bankruptcy Act)? We submit the answer is plain.

It is argued by the appellant's counsel that since the Trustee can have any judgment that might be rendered by the state court inquired into, etc., that he therefore has an adequate remedy in the bankruptcy proceedings. If he can avoid the effect of such a judgment, after it is rendered, there is no good reason why he can not prevent its rendition in the first instance and thus more speedily distribute the bankrupt's property among its creditors, and this is what the injunction accomplishes. Counsel also argue that since the Trustee has this inquisitorial power, no injurious results can follow the prosecution of its suit in the state court. But they have followed and are now more present than ever, viz: the interference with the speedy distribution of the assets among the creditors of the Keck Company and the necessary expense entailed upon them of the defense of this appeal. As said by the learned District Judge (Rec. 55, 56):

"The claim that the suit in the state court will not operate to delay the settlement of the bankrkupt's estate finds its answer in the fact that it has delayed and is now delaying proceedings in that respect. A *discreet trustee* would hardly proceed to disburse a fund with knowledge of an intent on the part of another to assert a claim of considerable size against the fund in his possession. The purpose of the suit brought by the Mitchell Company in the state court is to lay the foundation of a claim against the Duhme Company's funds, which are a part of the bankrupt's funds. Its motion in the Referee's court that a part of such funds should be set apart to await the action of the state court shows this to be true. The Mitchell Company has entered the bankruptcy court as regards its claim, and even now is prosecuting a petition to review an order of the Referee relating to the retention of the funds to meet the claim, if any, which it may be able to establish. The bankrupt's creditors are entitled to be heard as to whether the Mitchell Company has a claim or not. Neither they nor their representative, the trustee in bankruptcy, are parties in the state suit."

What object other than the embarrassment of the trustee and the administration of the bankrupt estate in his hands can the appellant have in abandoning proof of claim against the fund which is admittedly more than sufficient to pay its claim, and which is the only property of the Duhme Company in existence or likely to be in existence?

The opinion of the Circuit Court of Appeals (Rec. 69) states that the appellant's action is "of such a character as to suggest to a discreet trustee and a careful court the inadvisability of distributing the assets of the estate until it were seen that the trustee as the representative of the Keck creditors was protected." The criticisms of that opinion found

on pp. 13 to 17 of appellant's brief are sufficiently answered in the opinion itself. It is enough to notice in answer to one contention that the learned court considers fully the question of a contested suit in the state court as well as a possible default judgment.

Counsel argue, brief, p. 12, that the foregoing statement of the District Court is not correct because "there are other claims in litigation which prevent a distribution of the bankrupt estate." While it is true that there are two other claims which prevent the immediate distribution of the money necessary to cover them, they do not of course have any bearing on the distribution of the money necessary to cover appellant's claim. The only thing that is holding up the distribution of that money is appellant's action with regard to its suit in the state court.

It is insisted by the appellant that a judgment in the state court may be used as a basis of recovery against assets which the Duhme Company may subsequently possess, Appellant's Brief, pp. 11, 16. Aside from the improbability of such a thing, such assets, under the unimpeachable decree of the District Court, would belong to the Trustee in bankruptcy of the Keck Company, so that such a judgment would be worthless for that purpose. No possible pecuniary benefit can therefore result to it from such a judgment; on the other hand, injury has already resulted, and is now resulting, to the creditors of the Keck Company from its action in disregarding the order of the District Court commanding it to set up its claim therein for adjudication, to-wit; their inability to obtain payment of a dividend on their claims (Rec. 34), the expense of defending the various appeals, etc.

Furthermore the injunction as framed by the referee is only a temporary injunction, and may be dissolved after the distribution of the estate. This will give complete relief against all subsequently acquired assets which may not belong to the trustee. The injunction granted can have no effect on the appellant's right against the sureties on the lease as suggested on page 16 of its brief. A judgment against the principal is not essential to such a right and the appellant is more likely to lose its rights by failing to file its claim properly in the bankruptcy court than by failing to get an immediate judgment in a suit, the prosecution of which is enjoined.

That the bankruptcy court, after having acquired jurisdiction of the property of the bankrupt and of the alleged creditor, will not tolerate any step on his part which will interfere with, or disturb, or delay, or embarrass, the speedy administration and distribution of the estate, is clear from the following cases:

Keegan vs. King, 96 Fed. 758.

In re Kleinhaus, 113 Fed. 107.

In re Gutman, 114 Fed. 1009, approved in re Leeds Woolen Mills, 129 Fed. 922, at p. 928.

In re Hornstein, 122 Fed. 266, where the court said, p. 271:

"It is plain that the judge of a court of bankruptcy may lawfully grant such restraining order, operative on and binding litigants in the same court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the provisions of the bankrupt act. This

court has no hesitation in holding that express power is given by the act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a state court or elsewhere, from doing any act that will interfere with or prevent the due administration of the bankruptcy act. If this is not true, how frail and worthless is the law. In the face of a statute conferring the power, comity does not require the courts of the United States to compel persons whose rights are seriously jeopardized by proceedings in a state court to resort thereto for protection. This restraining order was properly granted, and must be upheld, if the petitioners had the right to institute this proceeding in involuntary bankruptcy."

In re Knight, 125 Fed. 35.

In re Mertens, 131 Fed. 507, 512, 513.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549, where the court said, page 553:

"At the threshold of this discussion we are met by the contention of the defendant Rosier that the District Court, as a court of bankruptcy, has no power to enjoin or stay proceedings in a state court in a case such as this, that its power to interfere is limited to proceedings which impede the enforcement of the bankruptcy act or interfere with the administration of the estate in bankruptcy. It is contended that such is not the effect of the action in the state court. Subdivision 15 of Section 2 of the act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) invests courts of bankruptcy with the power 'to make such orders, issue such process, and enter such judgments in ad-

dition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' It is said this section may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt company. In re Siegel-Hillman Dry Goods Co. (D. C.), 111 Fed. 980-983; Dodge vs. Norlin, 133 Fed. 363-368, 66 C. C. A. 425; Barden vs. Hawarden Bank, 178 U. S. 524-535, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

"In re Rochford, et al., 124 Fed. 182-187, 59 C. C. A. 388, 393, the Court of Appeals of this Circuit, speaking through Judge Sanborn, said:

"The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent to every court of equity, incidental and indispensable to the authority

to administer the property in its possession and to distribute its proceeds."

No good reason has or can be given why the Mitchell Company should not obey the order of the District Court and set up therein, fully and freely, its alleged claim against the Duhme Company. That claim, as we see it, falls within the following apt language used in the case of In re McCallum, 113 Fed. 393, Syl. 3 and 4:

"Where a bankrupt's estate has been converted into cash, and such cash is in the hands of the trustee in bankruptcy, a claim by a creditor for the payment of the full amount of his debt on the ground that it was for the value of goods which had been only consigned to the bankrupt, the title remaining in the creditor, but which had been converted into cash by the trustee, is nothing more than a claim against a fund in the hands of the court, which the court, as an incident to the power to distribute, has the right to hear and determine.

"Such claim, being a claim to a *superior right to a fund about to be distributed, and in which all of the other creditors of the bankrupt were interested*, should be determined in the District Court, *where the other creditors might be heard in defense of their rights*, and an application for leave to sue upon such claim in the state court should be refused."

If it has any claim at all, it must be on the theory that the assets of the Duhme Company, belonging to and owned by the Keck Company, have come into the hands of that Company's Trustee subject to, or impressed with, liens or equities in favor of persons who dealt with it in good faith

on the theory that it was a separate corporation, having property and assets of its own, etc. All of the cases cited under III. hold that the bankruptcy court can and will determine, in a way that will give creditors a full and proper opportunity of being heard, whether such liens, or equities, or interests exist, and if so, protect them. As a matter of fact, the District Court in the present case has already decided, not only that the claims of all persons who dealt in good faith with the Duhme Company shall be paid in full, but that the appellant made its lease to that company in good faith, etc. (Rec. 54). The only thing necessary for it to prove therefore is the amount due to it as such a creditor; the money to pay that amount when found by the court is in its hands for that purpose. Is the appellant fearful that the District Court will not give it a full and fair hearing on that question, or that it will deny to it some substantial right which it possesses?

The method adopted by the Trustee for the determination of the amount of its claim is one which Judge Lurton, in McMahon's case, supra, at page 687, described as a plenary one, and one, to use his language and that of Mr. Justice Day in Whitney vs. Weman, supra, at p. 553, "wherein the parties can be fully heard after the due course of equitable procedure."

VI.

The present case is no different from the ordinary one of a bankrupt owning say, five pieces of real estate absolutely unencumbered, and one piece against which SOME of his creditors have taken liens.

All of the real estate comes into the possession of the bankruptcy court *as the property of the bankrupt*. The one piece of real estate against which certain of his creditors have liens or claims is still his property and comes to the bankruptcy court as such; his creditors who share equally in the five pieces or its proceeds, also share equally in the other piece *after* it has paid any valid claims against it. In order to determine all the rights of the general creditors, it is necessary and proper that the court determine the rights of the special or secured creditors. There is nothing unusual or harsh about such a procedure. Instances of its exercise are McMahon's case, supra; In re Antigo Screen Door Co. supra, where the Circuit Court of Appeals for the 7th Circuit said, p. 253:

"That property was in equity the property of the bankrupt, subject to such lien as the mortgagee had thereon. If its value was in excess of a valid lien, that excess would go to the trustee. When, therefore, the property was turned over to the trustee as the property of the bankrupt, subject to the lien, the trustee held the property and its proceeds as assets of the bankrupt and in the bankruptcy proceedings."

Wherein do such cases and the principle which they lay down differ from the case at bar? The Keck Company, the adjudicated bankrupt, owned the Duhme Company; it was

and always had been one of its assets; the Mitchell Company claims that it (Keck Company) permitted it to do business with the Duhme Company (its property) in such a way as to give it a right to have that property applied to the payment of its claim before the Keck Company's general creditors should share in it. Why has not the bankruptcy court the jurisdiction and right to determine that question and the amount due to appellant, as much as in the case of the mortgage of real estate, and why can it not dispose of the question just as equitably? *Why does the appellant fear to submit the merits of its claim to that court?*

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

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